

Response to the CoSUS Ex Parte Presentation on Section 254(d) Issues

The Coalition for Sustainable Universal Service (CoSUS) filed an ex parte presentation on August 22, 2002. Its filing purports to show that its contribution assessment proposal is not barred by section 254(d). This response explains why the CoSUS justification fails to demonstrate that the CoSUS plan is lawful under section 254(d).

Overview for Implementing Section 254(d)

CoSUS claims that the comments raise two rather narrow legal questions, which it characterizes as: whether its proposal is "equitable and nondiscriminatory" and whether its plan violates §254(d) because "some carriers are not required to contribute." By substituting its own oversimplified questions for the fundamental legal questions raised in the record about its plan, CoSUS tries to leap over the fatal problem with its "connections" proposal: the method it has chosen for identifying "connections" to public networks -- and thus contributors and contributions -- (1) does not accurately identify the class of contributors required to contribute under the plain language and indisputable meaning of the statute and (2) actually ensures that a crucial mandatory class of contributors and its individual members will not contribute on an equitable and non-discriminatory basis.

The FCC's duty with respect to adopting a contribution assessment plan is to root its analysis and the resulting rules in section 254(d) and to implement the statute with an assessment method that fleshes out the language of the law and achieves what Congress intends. In contrast, CoSUS starts with the quite different purpose of gaining adoption of a plan to eliminate interexchange carriers' (IXCs') obligation to contribute to universal service as providers of interstate long distance services on their interstate public networks. Accordingly, CoSUS starts from its plan and tries to manipulate the statutory language to accommodate the result it seeks. But despite expert sleight-of-hand with statutory and extra-statutory phrases, the CoSUS arguments cannot hold up under a straightforward reading of the section itself. The plain language and unambiguous meaning of the law compel the FCC to reject as unlawful or substantially modify the CoSUS proposal. The proposal trips over the first task in implementing section 254(d) -- accurately capturing within its assessment scheme the universe of carriers to which section 254(d) explicitly applies. The proposal's formula consequently also fails to meet the "equitable and nondiscriminatory" interstate carrier contribution standard for a class of carriers within the scope of the section's contribution mandate.

This response deals with the second CoSUS question first. Understanding the error in both its statement of the question and its proffered answers exposes the heart of the proposal's infirmities under section 254(d).

The CoSUS Proposal Does Not Apply Contribution Obligations to a Crucial Class of Carriers Within Section 254(d)'s Unambiguous Contribution Mandate

Section 254(d) explicitly applies to and establishes contribution obligations for "every carrier that provides interstate telecommunications services." Accordingly, a valid "connection"-based proposal must properly define the "connections" it assesses to encompass the whole

statutorily-defined mandatory contributor universe and its constituent classes and individual members. As a practical matter, then, a "connections"-based assessment method must assess carriers responsible for any type of "connection" to a public network used to provide interstate services, as NRTA and OPASTCO and SBC/BellSouth have advocated. The CoSUS proposal misses the mark in this regard.

Instead, the CoSUS proposal defines "connections" in a way that applies only to one segment of the universe of "every carrier that provides interstate telecommunications services" – interstate access providers. Its definition of "connections" applies more narrowly than section 254(d) because providers of actual interstate transmission services to the public for a fee do not provide the restricted set of "connections" CoSUS defines for its contribution formula. Interstate long distance providers are not encompassed within the CoSUS "connection"-based contribution requirement no matter how extensive their interstate telecommunications services are, unless they also provide access connections. The selected definition of "connections" ignores the legal and operational fact that IXCs' long distance customers must connect with the geographically interstate networks via a relationship with an IXC or another interstate long distance carrier, either as a PIC customer of an IXC, or as a dial-around long distance customer.

CoSUS has chosen a formula to tap "every provider of interstate telecommunications services" that does nothing of the sort. Exchange access providers' services most frequently physically originate and terminate entirely within a single state and within the access provider's local service area. The local distribution links exchange access carriers provide are classified as "interstate" only to the extent that the access carrier is providing its local network to pick up or deliver interstate traffic routed to or handed off to it by an IXC or other provider of long distance calls that cross state boundaries. Moreover, even if local and long distance services are bundled, a "connection" to an interstate transmission provider is involved, and subscribing to the access link alone is not sufficient for a customer to complete a call via the interstate public switched network. A customer must subscribe to or otherwise engage an interstate provider authorized to provide the interstate leg for calls that cross state boundaries. Thus, the end-user "connections" in the CoSUS definition exclude the essential "connection" to the interstate circuit-switched voice network or Internet networks provided by Internet access providers.

By choosing a definition that assesses a narrow set of network "connections," selected to minimize IXCs' liability for contributions, the CoSUS proposal strays far from the mandatory contributors Congress established in section 254(d). The CoSUS proposal in its current form flouts the provision's intention for broad participation in supporting universal service. S. Rpt. 104-230 at 27-28 (intent is to include "all telecommunications carriers, including competitive access providers and any other carrier that meets the definition of a telecommunications carrier ... [to] spread the cost over all customers for any telecommunications service and prevent distortion of competitive forces"). To repair the CoSUS plan to bring it into compliance with the law – without forsaking the "connections"-based approach – requires a new definition broad enough to include connections to providers of geographically interstate network and transport activities, including IXCs and other "gatekeepers" for obtaining interstate telecommunications services. Until the plan assesses IXCs in their capacity as interstate common carriers that provide interstate telecommunications services, the plan must fail under 254(d). The FCC simply cannot accept a plan that excludes the class of carriers that directly provide state-to-state

telecommunications and, consequently, are the sine qua non for defining a formula to encompass the statutory universe of contributors. The CoSUS proposal unlawfully excludes the very services necessary for an IXC's or an ILEC's access services to qualify in the first place as part of an "interstate communication" under the statutory definition in section §3(22).¹ Those carriers and services must be incorporated via a broader definition of "connection." For the same reasons, the definition of "connections" should also include the public interstate Internet "network of networks," including associated packet-switched networks.

Bypassing this basic disqualifying flaw, CoSUS sets out to answer the question of whether a plan where admittedly "some carriers are not required to contribute" can withstand challenge under 254(d), since the language of the law requires "every" interstate common carrier to contribute. This question relates only to an ancillary effect and example of the proposal's legal infirmity. CoSUS has formulated a question that seeks to distract attention from the core problem that its plan limits the duty to contribute to providers of end-user public network connections and excludes other classes within the stated scope of §254(d) -- "every carrier that provides interstate telecommunications." Thus, it is in vain that CoSUS weaves an elaborate argument that every single carrier need not contribute, so long as some IXCs contribute when they also provide end-user access to some fraction of their end-user customers. Even less persuasive is its notion that defining the contributors so that some of the covered carriers have zero contributions -- regardless of the extent of their interstate telecommunications operations -- is another way of qualifying for the de minimis exception. These "we gave at the office" or "big is really small" rationales do not excuse redefining the covered class established in the statute. The "every carrier" clause cannot be satisfied by pointing to some IXCs that contribute in a capacity other than their provision of geographically interstate links. The determination of whether a plan is lawful requires a comparison of the coverage of its "connections" surrogate against the universe of interstate telecommunications carriers Congress enacted to define section 254(d)'s contribution mandate. And the conferees' careful explanation about the limited circumstances in which the de minimis exception would be appropriate defeats CoSUS in its efforts to twist the words into the opposite of what they say. Conference Report, 1-31-96, To Accompany S. 652 at 131.

Indeed, the FCC is only authorized to exempt carriers whose contribution would be genuinely "de minimis." CoSUS ridicules as "literalist" the argument that the FCC cannot adopt a plan that arbitrarily exempts all IXCs in their capacity as interstate providers. But the "literalist" reading is the correct one, and the suggestion that honoring the statute's explicit language is worthy of scorn is outrageous. The FCC itself has repeatedly interpreted the section, as it must, given the plain language of the statute, as strictly limiting the de minimis exception.²

¹ The Communications Act defines "interstate communication" as any communication that originates in one state and terminates in another. 47 U.S.C. § 153(e).

² See, e.g., Federal-State Board on Universal Service; Startec Global Communications Corporation Request for Forbearance or Exemption From the Universal Service Contribution Requirement, 14 FCC Rcd 8030, para. 2 (1999). ("The Act authorizes the Commission to exempt a mandatory contributor from contributing to the universal service support mechanisms only 'if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis'"); Federal-State Joint Board on Universal Service; United Native American Telecommunications, Inc. Request for Waiver, 13 FCC Rcd 22438, para.12 (1998) (footnotes omitted) (UNAT) ("Pursuant to section 254, the rules

The FCC has expressly stated that "[t]he statute and legislative history support the conclusion that the de minimis exemption may not be used to exempt any other class of contributors."³ This extends to the IXC class that CoSUS wants to exempt. The FCC has also determined that its "implementation of the mandatory contribution clause of section 254(d)" should "adhere[] to the tenet that the class of entities required to contribute to universal service should be broad."⁴ It has even refused a carrier's request to be exempt in whole or in part, by disregarding a segment of its revenues, because it could not pass the costs through to its customer. Said the FCC, "[t]he Commission's rules are clear that [a carrier's] contribution to universal service is not to be limited to the amount it can pass through to its end-users."⁵ The FCC has rejected, as beyond its authority, proposals to exempt many other classes of interstate telecommunications service providers:

We ... find no reason to exempt from contribution any of the broad classes of telecommunications carriers that provides interstate telecommunications services, including satellite operators, resellers, wholesalers, paging companies, utility companies, or carriers that serve rural or high cost areas, because the Act requires "every telecommunications carrier that provides interstate telecommunications services" contribute to the support mechanisms. Thus, we agree ... that any entity that provides interstate telecommunications services, including offering any of the services identified above for a fee directly to the public or to such classes of users as to be effectively available directly to the public, must contribute to the support mechanisms.⁶

The CoSUS plan should be denied under the same logic as the many other indistinguishable requests held to violate the statute.

CoSUS asserts (p.6) that the current regime does not assess carrier's carriers, claiming that the every carrier language must not be controlling. It attempts to analogize the current method's use of net retail revenues with its own choice of end-user connections. CoSUS reasons that if it is lawful to limit assessments to retail end-user revenues and not to assess wholesalers,

established in the Universal Service Order provide for the de minimis exemption as the only basis upon which the Commission may exempt a mandatory contributor. We believe that the legislative history of section 254(d) evidences a Congressional intent that this exemption be narrowly construed.⁴⁹"); Federal-State Joint Board on Universal Service, 13 FCC Rcd 11501, para. 140 (1998) (footnotes omitted):

This clause provides the only statutory authority for exempting a carrier or class of carriers that would otherwise be required to contribute to universal service mechanisms. The legislative history indicates that the de minimis exemption is extremely limited. Specifically, the Joint Explanatory Statement states that "this authority would only be used in cases where the administrative cost of collecting contributions from a carrier or carriers would exceed the contribution that carrier would otherwise have to make under the formula for contributions selected by the Commission."

³ UNAT, para. 142.

⁴ Federal-State Joint Board on Universal Service, supra, 13 FCC Rcd 11501, para. 128.

⁵ UNAT, para. 55.

⁶ Federal-State Joint Board On Universal Service, 12 FCC Rcd 8776, para. 787 (May 8, 1997).

thus not assessing ILECs for revenues from other carriers, it must be legal not to assess interstate long distance carriers. However, CoSUS overlooks dispositive differences between the two methods of assessing carrier contributions. In adopting the plan to assess contributions based on end-user retail revenues, all interstate carriers were subject to assessment of retail revenues – with exchange access providers assessed for subscriber line charge revenues. The FCC carefully explained the choice of retail revenues was necessary to prevent double counting of the same revenues at two levels, double cost pass-throughs to end-users (by both retail and end wholesale carriers) and market distortions.⁷ Moreover, the FCC held that wholesale carriers would, in any event, have been able to pass any contributions assessed on their wholesale revenues through to their carrier customers in their access rates, so retail carriers and their customers would bear the costs anyway.⁸ In contrast, the CoSUS scheme does not assess IXCs a fair share for their primary and defining interstate operations, either directly or indirectly. Thus, the current treatment of access providers, which assesses all interstate providers, cannot excuse the CoSUS plan's violations of section 254(d) by entirely removing IXC long distance customer "connections" from the equation. Assessing all public network connections once – interstate transmission as well as access network connections – rectifies the problem of double counting by properly dividing responsibility for access to local distribution networks and to long distance networks.

Commissioner Jaber's proposed remedy involving assessments on residential and single line business IXC accounts is headed in the right direction, but does not fully cure the CoSUS plan's disqualifying legal faults. The proposal would not assess connections to the interstate transmission services that interstate carriers furnish to their multi-line business customers. Transferring contribution responsibility for that important segment of their interstate telecommunications services to interstate access providers violates the statutory mandate that all interstate carriers must contribute on an equitable and nondiscriminatory basis, distorts the marketplace for multiline business services and invites gaming. It would compound the market distortions and further violate the equitable and nondiscriminatory contributions requirement because it would assess wireless systems less than local exchange carriers and interstate carriers for providing the same functions.

The FCC must either reject the CoSUS proposal or adopt a variant that fully rectifies its fatal flaw. It is a violation of section 254(d) and, consequently, beyond the FCC's power to exempt the IXCs from contribution by choosing a definition of "connection" that fails to include "[e]very carrier that provides interstate telecommunications."

⁷ "Basing contributions on end-user revenues eliminates the double-counting problem and the market distortions assessments based on gross revenues create because transactions are only counted once at the end-user level. Although it will relieve wholesale carriers from contributing directly to the support mechanisms, the end-user method does not exclude wholesale revenues from the contribution base of carriers that sell to end users because wholesale charges are built into retail rates." Federal-State Joint Board On Universal Service, 12 FCC Rcd 8776, para. 846 (May 8, 1997).

⁸ Access providers can no longer recover contributions in their access rates.

The CoSUS Proposal Violates the Statutory Requirement for Every Carrier to Contribute on an Equitable and Nondiscriminatory Basis

Section 254(d) goes on to require that "every carrier" in the statutory group "shall contribute, on an equitable and nondiscriminatory basis...." Under the CoSUS proposal, interstate carriers (as well as cable modem and other Internet access providers)⁹ do not contribute on an equitable and non-discriminatory basis. CoSUS claims (p.1) that its proposal and "basis for universal service contribution" meet the section 254(d) standard as "equitable and nondiscriminatory." But the statutory mandate is not just a vague, general requirement that the "basis" for universal service contribution or the CoSUS or any other "plan" be "equitable and nondiscriminatory." Section 254(d) specifically requires that each carrier that provides interstate services ["every carrier ..."] "shall contribute ... on an equitable and nondiscriminatory basis." Section 254(b) reiterates that "[a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service...."

CoSUS takes undeserved liberties with this statutory standard, noting that section 254(d) does not elaborate on the "equitable" and "nondiscriminatory" requirement. In fact, the terms are not ambiguous and have been interpreted by the FCC and courts. Nevertheless, CoSUS attempts to substitute "competitively neutral" – a far vaguer and more controversial gauge – for the statute's "equitable and nondiscriminatory" carrier contributions mandate. Applying its own substitute for the statute's standard, CoSUS proclaims its plan "the most competitively neutral." The rationale for ignoring Congress's standard is that the FCC justified adding "competitively neutral" to the §254(b) principles partly because the concept was "consistent with the explicit requirement of equitable and nondiscriminatory contributions." CoSUS strains (p. 3) to extract from this observation that "competitively neutral" comports with the section 254(d) requirement the unsupported conclusion that a plan cannot be equitable and nondiscriminatory if it is not "competitively neutral." From this confusion of the part with the whole, CoSUS then attempts to restrict the requirement for fairness and nondiscrimination to competitors, again straying far from the statute without justification.

CoSUS ignores the statutory standards of "equitable" and "non-discriminatory" to advance a series of specious arguments purporting to extract meaning from what an interpreting court and the statute do not say. It brushes aside a 5th Circuit statement that section 254(d) includes a component of "allocative fairness" because the court did not elaborate further on that concept. And because the statute did not further elaborate on the perfectly comprehensible "equitable and nondiscriminatory" requirement, CoSUS presumptuously asserts that its own substituted "competitive neutrality" standard trumps the statute's and the court's "standardless notions of fairness." CoSUS nods to fairness solely to identify it with avoiding transaction costs

⁹ The CoSUS defense focuses on IXC's. Accordingly, this response follows suit in that regard, although NRTA and OPASTCO urge the FCC not to leave the essential and inextricably related questions about cable modem and other Internet access providers' contribution obligations for resolution in other proceedings. The broadest possible contribution base will reduce all contributors' contribution burdens. Impact evaluation of a contribution-based approach also requires information about what contributors and public networks that serve customers will be covered.

for IXCs and avoiding problems with the current system. What CoSUS neglects to do is look at the inequity and unreasonable discrimination inherent in its proposal to shield IXCs from shouldering a fair share of universal service funding, while heaping more than their share of the responsibility on access network providers. It does not take further judicial or statutory elaborations to see that the CoSUS mechanism cannot pass any rational test for "fairness of allocations" or "equitable and nondiscriminatory" impacts.

CoSUS objects to assessments for customer "connections" to the interstate interexchange public networks because information about what service its own customers obtain is only maintained by access providers today. To the extent that information must be obtained from LECs, there is no reason to assume that LECs would not honor a reasonable FCC requirement to provide information. Moreover, CoSUS exaggerates in speculating about costs and competitive impacts of getting customer information. In fact, if CoSUS were correct about the burdens of obtaining information to assess all relevant interstate "connections" necessary to implement the statutory universe of contributors, its argument tells against its own plan: If a connection-based plan that incorporates all mandatory contributors under section 254(d) cannot be fashioned, the FCC must scrap the CoSUS proposal, not adopt it to relieve one class of mandatory contributors. CoSUS has simply demonstrated why end-user "connections" to access providers are not a reasonable means to identify the providers of interstate services required to contribute on an "equitable and nondiscriminatory" basis.

By the same token, CoSUS cannot persuasively complain that an all-inclusive "connection" plan "blatantly favors end user connection providers." To the contrary, it is its own plan that blatantly and unlawfully favors interstate interexchange service providers and services by trying to define them out of the mandatory contributors enacted by Congress.

It is true, as CoSUS argues (p. 3) that the statute does not expressly call for contributions based on revenues or minutes. The proponents of an inclusive universe of connections do not make that claim. Lack of a precise legislative standard for assessing contributions does not justify a plan that defines "connections" so as to exempt every IXC member of the statutory group of mandatory contributors from any contribution in its capacity as a long distance carrier. There is more than enough clear guidance in the language of section 254(d) to preclude assessments so fundamentally at odds with the preeminence, nature and extent of IXCs' interstate operations -- regardless of what obligations some members of the class may acquire as access providers or in some other capacity. Such grossly out-of-kilter apportionment of the responsibility for contributions among providers unreasonably discriminates between classes and among individual carriers, inequitably heaps most of the burden on carriers with less involvement in purely interstate telecommunications and robs the statutory directives and standards of their everyday meaning.

Conclusion

The CoSUS plan fails to implement either the requirement that every provider of interstate telecommunications must contribute to federal universal service support or that covered carriers' contributions must be assessed on an equitable and nondiscriminatory basis. The FCC must therefore follow the plain language of the statute, reject the CoSUS proposal and

instead adopt a lawful connection-based plan that encompasses connections with "every telecommunications carrier that provides interstate telecommunications services."